Before the
Federal Communications Commission
Washington, D.C. 20554

WC Docket No. 11-50

The Federal Communications Commission (Commission or FCC) has before it three petitions for declaratory ruling raising similar issues concerning the Telephone Consumer Protection Act of 1991 (TCPA). These three petitions arise from two pending federal court lawsuits filed under the TCPA. In their public notice, the Federal Communications Commission (FCC) seeks public comments on the petitions.

Question: Under the TCPA, does a call placed by an entity that markets the seller's goods or services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call (*i.e.*, physically place the call)?

Answer: I believe that a telemarketing call placed by an entity that markets a seller's goods or services qualifies as a call that is made on behalf of, and initiated by, the seller, even if the seller does not physically make or place the telephone call.

The Two Separate Private Rights of Action, 227(b) and 227(c):

The TCPA is divided into two separate categories of telemarketing calls, one category is under subsection 227(b), and the other category is under subsection 227(c). Telemarketing calls that fall under subsection 227(b) represent calls that Congress determined were more annoying or costly or dangerous, and were therefore more egregious. These types of calls include telemarketing calls made to cellular telephones by automatic telephone dialing systems, telemarketing calls that deliver prerecorded telephone solicitations to residential telephone lines, and telemarketing calls that deliver unsolicited advertisements by fax. In contrast, telemarketing calls that fall under subsection 227(c) include telemarketing calls made by live telemarketers to residential telephone lines, and these types of calls congress determined were less egregious.

I do not believe that Congress created two separate private rights of action for these two separate categories of telemarketing calls because legislators wanted to distinguish who was liable for the different types of calls (eg. the party that "sent" the fax, or "made" the call to a cellular telephone, or "initiated" the prerecorded telephone solicitation to a residential telephone line under -versus- the party that the call was made "on behalf of"). Instead, I believe that congress created two separate private rights of action so that those who benefit from less egregious telemarketing calls (ie. live telemarketing calls to residential telephone lines) could make one "free" call to telephone numbers that are not on any do-not-call list (national or company-specific). I do not believe that Congress created two separate sections of the TCPA with two separate private rights of action so that those who benefit from more egregious types of telemarketing calls could claim that they were not liable because the calls, although made on their behalf, were not "sent", or "made", or "initiated" by them. To allow such an interpretation of the TCPA would result in a less encompassing liability for the very types of telemarketing

calls that Congress deemed were more egregious. In other words, to allow such an interpretation of the TCPA would result in a situation where a seller could be held liable under 227(c) for less egregious live telemarketing calls made by a telemarketer on their behalf, while at the very same time they could not be held liable under 227(b) for more egregious prerecorded telemarketing calls made on their behalf by the very same telemarketer. Thus although there are two separate private rights of action, I believe they should be interpreted as having a single common definition of who is liable.

The TCPA is a Consumer Protection Statute:

The TCPA is a consumer protection statute, and it should therefore be construed in a way that effectuates its purpose. If a seller wants to outsource their telemarketing, or purchase telemarketing leads from someone else, then that company should be able to benefit from the outsourced marketing services that they pay for. But "let the buyer beware", they should not be allowed to accept the benefits (ie. the profits) of illegal telemarketing without also being held accountable for the liability that goes along with that illegal telemarketing.

Sellers Can Control The Actions of Telemarketers Who Call on Their Behalf:

It is abundantly clear to me that despite their protestations to the contrary, sellers can control the actions of their agents, affiliates, marketers, independent contractors, independent retailers, lead providers, etcetera. For instance, I used to receive a lot of illegal prerecorded telephone solicitations for satellite TV services provided by DirecTV. Although I sued DirecTV and their "independent contractors" several times, I still continued to receive illegal prerecorded telephone solicitations on behalf of DirecTV. However, after the FTC sued DirecTV for several million dollars the prerecorded telephone solicitations that I was receiving on their behalf stopped.

Unfortunately, after I stopped receiving illegal prerecorded telephone solicitations on behalf of DirecTV, I began to receive illegal prerecorded telephone solicitations on behalf of Dish Network. I sued Dish Network and their "independent retailers" several times, but I continued to receive illegal prerecorded telephone solicitations on behalf of Dish Network. However, since the FTC sued Dish Network I have not received a single illegal prerecorded telephone solicitation on their behalf.

Another example is the multi-level marketing company Herbalife. I used to receive illegal prerecorded telephone solicitations on behalf of Herbalife, and I ultimately sued Herbalife and two of their multi-level marketing affiliates for one such call. Of course Herbalife claimed that they didn't initiate or make the telemarketing call that I received, and that instead it was initiated or made by one of their multi-level marketing affiliates. Of course it should come as no surprise that each person at each level of the multi-level marketing food chain claimed that they didn't initiate or make the telemarketing call that I received. Unfortunately my civil case against Herbalife didn't stop the multi-level marketing affiliates of Herbalife from making illegal prerecorded telephone solicitations on behalf of Herbalife. Instead it took a multi-million dollar class action law suit against Herbalife, before Herbalife was convinced that it was in their best interest to do whatever was needed to actually prevent illegal telemarketing on their behalf by their multi-level marketing affiliates. Ever since that class-action against Herbalife I have not received a single illegal prerecorded telephone solicitation on their behalf.

Sellers often claim that they didn't "send" the fax to me, or "make" the call to my cellular telephone, or "initiate" the prerecorded telephone solicitation to my residential telephone line, and that instead those actions were performed by someone else without their knowledge. But clearly sellers can control the actions of those who make telemarketing calls on their behalf - if they want to. Unfortunately, just as clearly, they don't have any incentive to stop others who engage in illegal telemarketing on their behalf if they can benefit financially from that illegal telemarketing and avoid liability at the same time. In other words, if sellers are not liable for the actions of those who make telemarketing calls on their behalf, then sellers have a very strong financial incentive to find and utilize an endless stream of shady entities that will generate business for them by making illegal telemarketing calls in violation of the TCPA. After all, by utilizing such a situation sellers have everything to gain, and nothing to lose.

If sellers are held liable under 227(c) when less egregious live telemarketing calls are made on their behalf, but they are not held liable under 227(b) when more egregious prerecorded telemarketing calls are made on their behalf (by claiming that they didn't "make" the call to the cellular telephone or "initiate" the prerecorded telephone solicitation to the residential telephone line), then I think it is obvious that sellers will simply stop working with telemarketers that make live calls on their behalf and instead they will work with telemarketers that make illegal prerecorded telephone solicitations on their behalf - thereby reaping in all of the benefits of the illegal telemarketing without incurring any of the liability.

The seller should be liable under the TCPA because it is the seller that takes the consumer's hard earned money, and it is the consumer's hard earned money, paid to the seller, that greases the wheels of the telemarketing industry. Without the seller there is no telemarketer. Of course sellers would rather engage with shady telemarketers, turn a blind eye to what the telemarketer does, and then have the consumer chase after the shady telemarketer that the seller specifically chose to market their goods or services. Why should the consumer have to suffer because the seller chose to deal with a shady telemarketer?

Question: What should determine whether a telemarketing call is made "on behalf of" a seller, thus triggering liability for the seller under the TCPA? Should federal common law agency principles apply? What, if any, other principles could be used to define "on behalf of" liability for a seller under the TCPA?

Answer: I believe that a telemarketing call is made "on behalf of" an entity if that entity stands to benefit financially from the call, and I believe that whatever general principals are used to define who is liable should be uniform across the United States.

Liability Under Two Simple Telemarketing Schemes:

In the simplest telemarketing scheme, an entity selling goods or services performs their own "in house" telemarketing. In such a case, the seller and the entity on whose behalf the telemarketing calls are made are one and the same. Thus only one party would be liable to a consumer if the consumer received a telemarketing call made in violation of the TCPA.

In a slightly more complex but none-the-less relatively simple telemarketing scheme, an entity selling goods or services might "outsource" telemarketing by entering into some type of business relationship with a separate company that would engage in telemarketing on their behalf. In such a case there is a seller, and there is a telemarketer, but the calls are made on behalf of both parties because both parties benefit from the calls. I believe that in such a situation both parties (ie. the seller and the telemarketer) should be potentially liable to any consumer who receives a telemarketing call that was made in violation of the TCPA. Of course if there is some sort of contractual agreement between the two parties such that one of them is liable to the other for any violations of the TCPA (ie. indemnification), then that liability would be between the two parties. But any possible liability between the two parties should be a separate issue from the fact that both parties should be liable to the consumer whose privacy was violated so that both the seller and the telemarketer could benefit from the illegal telemarketing.

Liability Under a Much More Common and Complicated Telemarketing Scheme:

While I have seen both of the above relatively simple telemarketing schemes, in my experience the situation is usually more complicated. For instance, a much more common situation is where Company A is the party that actually physically dials telephone numbers and plays prerecorded messages. Company B enters or uploads the numbers to be dialed and the prerecorded messages to be played into Company A's dialer. Company C accepts the inbound calls that are made when prospective customers press "one" in response to the prerecorded message, then screens the prospective customers, and then transfers those who qualify to Company D. Finally Company D sells goods or services to the consumer that are provided by or fulfilled by Company E.

This more common and more complicated telemarketing scheme allows each of the five separate entities involved to claim that they did not send, make, or initiate the calls, that the calls were not made on their behalf, and that instead the calls were sent by, made by, initiated by, or made on behalf of, one of the other entities. Thus, this more common and more complicated telemarketing scheme involves a joint venture such that each of the participants benefits from the illegal telemarketing while at the same time each of the participants is able to lay the blame and the liability on one of the other participants. In virtually every instance of this type of joint venture the parties that I have spoken with have tried to assign the liability to a party that cannot be found or to a company that is nothing but an empty shell.

As in the case with DirecTV, Dish Network, and Herbalife, I believe that each of the separate parties in any such joint venture has the ability to control the actions of those that they associate with, and that if they accept the benefits of illegal telemarketing, then they should also accept the liability. Thus I believe that in this more common and complicated telemarketing scheme each of the parties involved in the joint venture (ie. Company A through Company E) should be potentially liable to any consumer who receives a telemarketing call that was made in violation of the TCPA. Of course if there is some sort of contractual agreement between one or more of the separate parties such that one of them is liable to the other for violations of the TCPA (ie. indemnification), then that would be between the those parties. But any possible liability between the various parties should be a separate issue from the fact that each of the parties should be liable to the consumer received an illegal telemarketing call in violation of the TCPA.

Liability Under the TCPA Should be Consistent Across the United States:

I do not profess to understand all of the issues concerning state versus federal agency law and joint venture law, but I believe that the TCPA was enacted as a federal statute so that there would be a single law concerning telemarketing practices that would be consistent across all of the United States. With that in mind, I believe that the general principles defining liability under the TCPA should be consistent across all of the United States. Thus I believe that to the extent possible, the FCC should interpret liability under the TCPA in a way that makes it clear to all those who engage in telemarketing that they can be held liable for violations of the TCPA if the telemarketing was made on their behalf or if they benefited financially from the call.

Proposed Language

A telephone call is made or initiated on behalf of a person or entity if that person or entity did or could have received financial benefit from the call or if they provided any compensation or consideration to any other party related to the call. A telephone call that is made or initiated on behalf of a person or entity will be treated as if the person or entity itself made or initiated the telephone call.